APPEAL NO. 991594

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 29, 1999. The issue at the CCH was whether the appellant (claimant herein) was entitled to supplemental income benefits (SIBS) for the 15th compensable quarter from April 4, 1999, through July 3, 1999. The hearing officer concluded that the claimant was not entitled to these benefits. The hearing officer based this conclusion upon her finding that the claimant did not make a good faith effort during the filing period for the 15th compensable quarter to find work in line with ability to work. The claimant appeals, contending that during the filing period she had no ability to work because she could barely walk, stand, or sit. There is no response from the respondent (carrier herein) to the claimant's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the claimant sustained a compensable back injury; that the claimant had a 16% impairment rating; that the claimant did not commute any portion of her impairment income benefits; and that the 15th compensable quarter for SIBS ran from April 4 through July 3, 1999. The evidence showed that the claimant's injury was a back injury due to lifting at work which resulted in one spinal surgery at two lumbar levels in _____. The claimant testified that she did not seek employment during the filing period as she was unable to work. The claimant did testify that her condition had improved since the filing period due to rehabilitation she had received.

Dr. J, M.D., the claimant's treating doctor, stated in a letter in April 1999 that the claimant has been unable to work since she began treatment with her on April 1, 1996, and describes the claimant's condition as follows:

> She can not remain in the same position for prolonged periods of time without increasing the severe pain she is already enduring. She has to be able to change positions frequently at her own volition, from sitting to standing, walking or lying down. She is unable to bend over, unable to lift, push or pull any object without worsening of her severe condition. She is unable to kneel, and to perform repetitive movements of her lower extremities.
>
> She is currently receiving muscle relaxants to make her pain tolerable and allow her to function at a minimal level. Due to medication effect and physical limitations, she can not operate any vehicles or any kind of machinery, without posing any [sic] threat to others. It is my professional

> opinion, that [the claimant] is unable to perform any gainful activity at the present time. She is still under my care and receiving medical treatment.

Dr. D, the carrier's independent medical examination doctor, stated in a letter of February 16, 1999, which described his February 3, 1999, examination of the claimant:

> As for her ability to return to work, [the claimant] should be able to return to some type of occupation that did not require lifting or carrying of more than 30 pounds or excessive repetitive twisting, bending or stooping.

Additionally, there was a functional capacity evaluation (FCE) in evidence which indicated that the claimant was capable of sedentary work. Finally, there was a report in evidence from Dr. T, M.D., who did a peer review at the carrier's request, and who stated that based on the information made available to him he was unable to express an opinion concerning the claimant's ability to work because an FCE "has restricted clinical application" and "I look upon an FCE as only an adjunct to a thorough clinical examination."

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS] for any quarter claimed."

The hearing officer found that the claimant's unemployment during the filing period was a direct result of her impairment and since this finding has not been appealed it has become final pursuant to Section 410.169. This case revolved around the claimant's failure to make a job search. We have previously held that the question of whether the claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if an employee established that he or she has no ability to work at all during the filing period, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is "firmly on the claimant" and in Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, we noted that an assertion of inability to work must be "judged against employment generally, not just the previous job where the injury occurred." We have likewise noted that medical evidence affirmatively showing an inability to work is required if a claimant is relying on such inability to work to

replace the requirements of demonstrating a good faith attempt to find employment. Appeal No. 941382, *supra*; Texas Workers' Compensation Commission Appeal No. 941275, decided November 3, 1994. Finally, we have emphasized that a finding of no ability to work is a factual determination.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we do not find a basis to reverse the hearing officer's finding that the claimant has some limited ability to work during the filing period for the 15th compensable quarter. This finding has support in the report of Dr. D. While Dr. J expressed a contrary opinion, it was the province of the hearing officer to resolve conflicts in the medical evidence.

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge